Supreme Court, U.S.
FILED
JUN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86 1949

In The
Supreme Court of the United States
October Term, 1986

WILLIAM H. MARTIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE GOVERNMENT MAY BOLSTER THE CREDITIBILITY OF ITS CRIMINALS-TURNED-WITNESSES BY DRAFTING PLEA BARGAIN AGREEMENTS WHICH CONTAIN RECITALS THAT THE WITNESSES AGREE TO TESTIFY TRUTHFULLY AND THAT FALSE TESTIMONY WILL EXPOSE THEM TO PROSECUTION FOR MAKING FALSE STATEMENTS AND FOR PERJURY?

II. WHETHER THE DISTRICT COURT MAY INSTRUCT A JURY THAT CONSCIOUS AVOIDANCE OF KNOWLEDGE MAY BE TANTAMOUNT TO ACTUAL KNOWLEDGE IN CASE WHICH WAS PROSECUTED ON A THEORY OF ACTUAL KNOWLEDGE AND WHICH CONTAINS NO AFFIRMATIVE EVIDENCE OF WILLFUL IGNORANCE?

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28 U.S.C. Sec. 1254 1

William H. Martin prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered on April 6, 1987.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reproduced as Appendix A.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the First Circuit was entered on April 6, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

STATEMENT OF THE CASE

This case presents two significant issues for review by this Court: first, whether the Government should be permitted to bolster the credibility of criminals-turned-witnesses by larding their plea bargain agreements with self-serving promises of truthfulness and gratuitous threats of prosecution for perjury; and second, whether a jury may be instructed that a defendant's deliberate avoidance of guilty knowledge may be tantamount to actual knowledge in a case prosecuted solely on an actual knowledge theory

and wholly devoid of any evidence of conscious ignorance. Neither of these issues implicate broad constitutional principles, or complex or novel theories of law. Rather they are significant precisely because of their plebian nature. Plea bargain agreements and guilty knowledge instructions are the stuff of every-day criminal trial practice. They occur routinely in routine cases; and are routinely the subject of dispute between prosecution and defense.

In neither of these areas, however, has this Court offered any guidance; and as a result the Circuits are split on their approaches to the issues.

The First Circuit decided these questions against the petitioner in a fashion that, as a practical matter, places it at odds with considered lines of cases from the Ninth Circuit. Petitioner suggests that these questions are worthy of resolution by this Court to bring a measure of certainty to areas of continuing controversy in the conduct of federal criminal trials.

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FACTUAL BACKGROUND

On October 24, 1985, William H. Martin, Jr. was convicted of conspiracy to transport and to conceal stolen motor vehicles, and of multiple substantive counts of transporting and concealing motor vehicles, all in violation of 18 U.S.C. Sec. 371, 2312, 2313. The Government's evidence established beyond doubt the existence of an unlawful salvage switch scheme where cars would be stolen in Rhode Island, given the identification numbers of previously junked cars, and sold wholesale at the Northway

automobile auction in New York. The issue at trial was whether Mr. Martin, an automobile jobber who delivered these cars to the auction and sold them, ever knew that they were stolen or whether he was an innocent dupe of the men who organized and operated this criminal scheme.

On this point, the Government's case came from the mouths of two witnesses: Armand Cortellesso and Nicholas Speakman. These two individuals had been charged in the indictment with being respectively the originator/ringleader of the enterprise and its chief lieutenant. Shortly before trial, they entered plea bargain agreements with the Government whereby they would plead guilty to the first two counts of the Indictment and the remaining fifty-five counts would be dismissed. The Government would recommend a jail sentence on the first count, conspiracy, which carried a maximum sentence of five years in prison, and would make a binding non-jail recommendation on the second. The agreements also required Cortellesso and Speakman to testify against their co-defendants upon the Government's request.[1]

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[1] The full text of Cortellesso's plea agreement read as follows:

> Defendant Armand Cortellesso hereby enters into the following plea agreement with the government in the above-captioned case. (1) Cortellesso agrees to enter guilty pleas to Count 1 and Count 2 of the Indictment. (2) With respect to the sentence to be imposed under Count 1, Cortellesso understands that the government will recommend that the Court impose a substantial jail sentence. Cortellesso understands that the maximum punishment which the Court can impose under Count 1 is five years imprisonment and a $10,000 fine. Paragraph 3: In view of the fact that the government will recommend a jail sentence under Count 1, the government agrees that a nine-year jail sentence is

(Continued on following page)

(Continued from previous page)

appropriate with respect to Count 2 and the government shall make such a binding non-jail recommendation to the Court as to that count pursuant to the Federal Rules of Criminal Procedure. The limitations set forth in this paragraph shall not otherwise preclude the Court from imposing, nor shall the government be restricted in recommending any other type of non-jail sentence with respect to Count 2, including but not limited to, the imposition of a substantial fine and a lengthy probationary period which will commence upon Cortellesso's release from his sentence on Count 1.

Cortellesso agrees to cooperate fully with the government. Cortellesso shall meet with the attorneys and/or agents of the government upon their request and he shall disclose to them all information, evidence and details relating to the offenses charged in the Indictment in this case. Cortellesso shall provide full and truthful testimony at any and all trials of the Defendants named in this Indictment.

At the time of sentencing, the government will dismiss the remaining counts of the Indictment against Cortellesso and will not oppose his release from prison when he becomes eligible for parole, provided that Cortellesso has otherwise conducted himself in a manner satisfactory to federal prison authorities during his term of imprisonment. Cortellesso fully understands that the giving of false information or false testimony shall be considered a failure to cooperate and will not only violate the terms of this agreement, but shall also expose Cortellesso to further criminal prosecution for making false statements to a government agency, the maximum penalty for which is five years in jail and a $10,000 fine, and perjury, the maximum fine for each perjurious statement also being five years imprisonment and a $10,000.00 fine.

Counsel for Cortellesso hereby states that he has read this plea agreement, explained it to Cortellesso and he states that to the best of his knowledge and belief, Cortellesso fully understands it.

Cortellesso hereby states and agrees that he has read this pleas agreement, has discussed it with his Counsel, and that he understands it fully.

Speakman's plea agreement was the same.

At trial these two men accused Martin of being privy to and knowingly participating in their criminal schemes. The Government enhanced the credibility of these disreputable witnesses by introducing into evidence their plea bargain agreements which were laced with Government-authored recitals that if either Cortellesso or Speakman dared to deviate from the truth they would be prosecuted for perjury. At the end of the trial, at the climax of his closing argument, the prosecutor reminded the jury of these recitals. The Government had taken pleas from these men and had not launched a perjury prosecution against either of them. Indeed the prosecutor was asking that they be believed. Hence the jury could justifiably conclude that the Government believed that these witnesses had kept their part of the bargain by telling the truth.

This vouching problem was aggravated by an instruction to the jury which permitted it to find that the defendant knew the cars were stolen if it concluded he had deliberately closed his eyes to what was going on. This instruction, even when warranted by the evidence, creates a risk that a jury may depreciate the *mens rea* required for a criminal conviction. It should, therefore, be reserved for the rare case where the Government produces affirmative evidence of deliberate avoidance of knowledge. Here no such evidence was produced, yet the jury was permitted to assess the key factual issue in the case—guilty knowledge—under this problematical standard.

On appeal of these issues, the First Circuit rejected petitioner's arguments that the plea bargain agreement recitals constituted improper vouching and that the deliberate ignorance instruction should not have been given.

On the first issue, the Court eschewed the analysis of a long line of opinions from the Ninth Circuit beginning with *United States v. Roberts,* 618 F.2d 530 (9th Cir. 1980), *cert. denied,* 452 U.S. 942 (1981), and instead followed the lead of the Fifth, Sixth and Eleventh Circuits by holding that the recitations of the plea bargain agreement did not amount to improper vouching. On the second issue, the deliberate ignorance instruction, the First Circuit rejected the limitation forged in *United States v. Jewell,* 532 F.2d 697 (9th Cir. *en banc*), *cert. denied,* 426 U.S. 951 (1976) that the charge was warranted only where there was affirmative evidence that the defendant deliberately avoided positive knowledge of the wrongdoing to avoid responsibility in the event of discovery. Instead it concluded that as the jury might have disbelieved Cortellesso's and Speakman's testimony of actual knowledge, a deliberate ignorance instruction was appropriate, notwithstanding the total lack of evidence of conscious avoidance of knowledge. In effect this ruling authorizes a conscious avoidance instruction in every case where guilty knowledge is at issue.

These rulings will have a significant impact on the way criminal trials are conducted in the First Circuit. Government-authored plea agreements with cooperating witnesses, drafted in clear anticipation of litigation, have become a standard means of blunting the force of impeachment for bias or motive. And conscious avoidance of guilty knowledge instructions have been cropping up in the First Circuit with increasing frequency. *See e.g., United States v. Masse,* No. 85-1409, slip op. (1st Cir. 1987); *United States v. Krowen,* 809 F.2d 144 (1st Cir. 1987); *United States v. Rothrock,* 806 F.2d 318 (1st Cir. 1986). The opinion below is squarely at odds with positions taken by the Ninth Cir-

cuit in comparable cases. This Court has never addressed these issues. A petition for writ of certiorari should issue to review these often litigated but never definitively resolved questions which are of continuing day-to-day concern in federal criminal trials.

ARGUMENT

I. THE GOVERNMENT MAY NOT BOLSTER THE CREDIBILITY OF ITS CRIMINALS-TURNED-WITNESSES BY DRAFTING PLEA BARGAIN AGREEMENTS WHICH CONTAIN RECITALS THAT THE WITNESSES AGREE TO TESTIFY TRUTHFULLY AND THAT FALSE TESTIMONY WILL EXPOSE THEM TO PROSECUTION FOR MAKING FALSE STATEMENTS AND FOR PERJURY

The lower federal courts have generally accepted the proposition that "[a]ttempts to bolster a witness by vouching for his credibility are normally improper and error." *United States v. Ellis,* 547 F.2d 863, 869 (5th Cir. 1977). Improper bolstering may occur explicitly, *e.g., Gradsky v. United States,* 373 F.2d 706, 710 (5th Cir. 1972), or implicitly as where a prosecutor suggests that the Government checks the credibility of its witnesses before using them. Judge Friendly has noted that comments in summation suggesting that the Government has motivated a witness to tell the truth "are prosecutorial overkill." *Unite States v. Arroyo-Angulo,* 580 F.2d 1137, 1150 (2nd Cir. 1978) (Friendly, J., concurring). Such remarks "inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating wit-

ness to make sure that the latter is not stretching the facts —something the prosecutor usually is quite unable to do." *Id.* at 1150 (Friendly, J., concurring).

In *United States v. Roberts,* 618 F.2d 530 (9th Cir. 1980), *cert. denied,* 452 U.S. 942 (1981) the Ninth Circuit applied these principles to criticize the admission into evidence of written plea agreements containing self-serving recitals of promises to tell the truth.[2] *Roberts* warned against "a growing practice in which prosecutors, after artful drafting of plea bargain agreements, containing elaborate recitals of the witness' promise of truthfulness, seek admission of the entire document in jury trials without excising those self-serving portions." *United States v. Brown,* 720 F.2d 1059, 1073 (9th Cir. 1983) (discussing *Roberts* enroute to reversing a conviction for failure at trial to redact plea bargain agreement). The Ninth Circuit did not suggest that plea bargain agreements may not be introduced into evidence at all. Rather the Court suggested only that "[e]vidence is not admissible, . . . , simply because it is contained in or is offered to explain a plea agreement." *United States v. Roberts,* supra at 535. In

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[2] The plea agreement at issue in *Roberts* read as follows:

> It is agreed by all parties that the defendant shall testify truthfully and completely at all times, whether under oath or not, to the crimes mentioned in this agreement. This shall include all interviews, depositions, hearings and trials. Should the defendant refuse to testify or should he at any time testify untruthfully or if any material fact in the defendant's transcribed statements given to the State prior to this agreement be false, then this entire agreement is null and void and the original charges will be automatically reinstated.

United States v. Roberts, supra at 535.

considering language in plea bargain agreements as with any other evidence, the district court "must weigh the probative value of the evidence against its prejudicial impact and against the possibility the jury will use the evidence improperly." *Id.* at 536. Plea agreements which contain promises of truthfulness and other more egregious self-serving recitals, such as the perjury paragraph here, overbalance the latter half of this equation:

> A strong case can be made for excluding a plea agreement promise of truthfulness. The witness, who would otherwise seem untrustworthy, may appear to have been compelled by the prosecutor's threats and promises to come forward and be truthful. The suggestion is that the prosecutor is forcing the truth from his witness and the unspoken message is that the prosecutor knows what the truth is and is assuring its revelation.

United States v. Roberts, supra at 536.[3]

In the present case, the First Circuit rejected the Ninth Circuit's analysis in favor of such cases as *United States v. Townsend,* 796 F.2d 158 (6th Cir. 1986), *United States v. Binker,* 795 F.2d 1218 (5th Cir. 1986), *cert. denied,* — U.S. — (1987), and *United States v. Dennis,* 786 F.2d 1029 (11th Cir. 1986). It held that plea agreements may both undermine and enhance a witness' credibility, and that Government was entitled to reveal the entire agree-

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[3] In *Roberts* the prosecutor not only introduced the plea agreement, but suggested in closing argument that a police officer had been monitoring the witness' testimony. The Court reversed on this latter ground but went on to discuss at length the problems with plea agreements that contain comparable but less explicit efforts to bolster the credibility of witnesses.

ment in order that the jury appreciate the true extent of the witness's motives and interests. Opinion at App. 6.

Although facially appealing, this rationale does not withstand analysis. First and foremost, it begs the question at issue by ignoring the vouching aspect of plea bargain covenants. As *Roberts* noted, plea bargain recitals should not be admissible simply because some prosecutor decided to include them in an agreement. *United States v. Roberts, supra* at 535. Rather the likelihood of unfair prejudice must be weighed against the probative value of the evidence. If on Day 1 the Government contracts with a witness to give truthful statements and testimony in return for a certain plea bargain, and the contract specifies that false statements and testimony are a breach of the agreement and will subject the witness to a perjury prosecution; and on Day 10 the Government after having taken a statement agrees to the entry of a plea; and on Day 20 the Government presents this witness' testimony to a jury and asks the jury to believe him or her, what can a jury think except that the Government, outside the courtroom, has investigated the witness's bona fides and found that s/he is telling the truth? This inference is sufficiently compelling to a lay jury to make the plea recitals and their fulfillment a form of improper vouching.

The second problem is that this logical and compelling inference is very likely to be wholly inaccurate. As Judge Friendly has noted, in fact prosecutors are usually quite unable to monitor the testimony of a cooperating witness to insure that he or she is telling the truth. *United States v. Arroyo-Angulo, supra* at 1150 (Friendly, J., concurring). A prima facie case can usually be built on uncorroborated

testimony, and a prosecutor often will not know any more than the jury who hears the evidence whether the story is true.

The third problem is that the defense is in no position to rebut this inference of extra-judicial monitoring. To do so would require calling the prosecutor to the stand, thereby highlighting the precise vouching problem posed by the plea agreement recitals in the first instance.

Plea bargain agreements by their very nature have become documents drafted by professional advocates in anticipation of litigation. They are in essence manufactured evidence, designed to be as self-serving as possible. While this attribute may not by itself make the covenants incompetent as evidence, here the problem is aggravated by the practical impossibility of the defense revealing this bias and exposing the weakness of the inference that the witness has been "truth-tested", without putting the prosecutor himself on the witness stand.

The First Circuit Court of Appeals erred in allowing the introduction of these self-serving recitals which are as a practical matter beyond the reach of adversarial examination.

II. THE DISTRICT COURT MAY NOT INSTRUCT A JURY THAT CONSCIOUS AVOIDANCE OF KNOWLEDGE MAY BE TANTAMOUNT TO ACTUAL KNOWLEDGE IN A CASE WHICH WAS PROSECUTED ON A THEORY OF ACTUAL KNOWLEDGE AND WHICH CONTAINS NO AFFIRMATIVE EVIDENCE OF WILLFUL IGNORANCE

No one at trial doubted that William Martin had been selling stolen cars through the Northway Exchange. The

question for the jury, however, was did he know the cars were stolen or was he the dupe of Armand Cortellesso.[4] The Government asked for, and the Court gave over defense objection, a charge to the jury that if it found Martin consciously avoided actual knowledge of the criminal nature of his conduct, it could find the knowledge element of the indictment to have been satisfied.[5]

In *United States v. Jewell*, 532 F.2d 697 (9th Cir. *en banc*), *cert. denied*, 426 U.S. 951 (1976), the Ninth Circuit discussed at length the origins and rationale for the "deliberate ignorance" charge. It concluded that the charge was warranted where the Government presented evidence

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[4] Guilty knowledge is an integral part of all the charges in the indictment: conspiracy, 18 U.S.C. Sec. 371; transportation of stolen motor vehicles, 18 U.S.C. Sec. 2312; concealment of stolen motor vehicles, 18 U.S.C. Sec. 2313; and transportation of forged securities, 18 U.S.C. Sec. 2314.

[5] The instruction was as follows:

> These charges deal in various aspects, which I've already been through and will not attempt to recapitulate, with the element of knowledge. The law holds that the element of knowledge may be satisfied by inference drawn from proof, if you find that it exists, that a Defendant deliberately disregarded what would otherwise have been obvious to him. If you find beyond a reasonable doubt a conscious purpose to avoid enlightenment, this would permit you to draw an inference of knowledge. Or stated another way, a Defendant's knowledge of a fact may be inferred from a willful disregard of the existence of the fact. It is entirely up to you as to whether you find any such willful disregard or deliberate closing of the eyes in this case. And even should you so find, it is up to you as to the inferences to be drawn from any such evidence. I do caution you that a showing of negligence or mistake is not sufficient to support a finding of willfulness of knowledge or deliberate disregard.

that the defendant "deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery." *Id.* at 699 (note omitted). The cases following *Jewell* make clear that "[t]he *Jewell* instruction should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance." *United States v. Murrieta-Bejarano,* 552 F.2d 1323, 1325 (9th Cir. 1977). The Ninth Circuit has stressed that "there must be evidence 'that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged.'" *United States v. Garzon,* 688 F.2d 607, 609 (9th Cir. 1982), quoting *United States v. Murrietta-Bejarano, supra* at 1326.

Where the Government's evidence if believed, would establish actual knowledge, not deliberate avoidance, the charge is inappropriate and requires reversal of the conviction. *United States v. Pacific Hide & Fur Depot, Inc.,* 768 F.2d 1096 (9th Cir. 1985) (reversing conviction where Government's evidence showed either negligence or actual knowledge but not deliberate avoidance); *United States v. Beckett,* 724 F.2d 855 (9th Cir. 1984) (reversing conviction where Government's evidence showed actual knowledge not deliberate avoidance); *United States v. Garzon, supra* (same). Similarly, where the evidence shows that an accused was mistaken, recklessly disregarded the truth, or negligently failed to inquire, a deliberate avoidance instruction should not be given. *McAllister v. United States,* 747 F.2d 1273, 1275 (9th Cir. 1984); *United States v. Williams,* 685 F.2d 319, 325 (9th Cir. 1982).

The reason for these limitations on the *Jewell* instruction is clear. The instruction necessarily creates the risk that a jury will depreciate the *mens rea* required for a criminal conviction and "convict on a standard of negligence: that the defendant *should* have known his conduct was illegal." *United States v. Garzon, supra* at 609 (emphasis original).

The First Circuit's opinion rejects these limitations on the use of a conscious avoidance of knowledge instruction. The Government prosecuted this case on a theory of actual knowledge: that petitioner was a fully-informed conspirator. None of the prosecution's evidence suggested that he deliberately avoided guilty knowledge. And the defense put in no evidence at all. The First Circuit hypothesized that the jury might have disbelieved the Government's cooperating witnesses as to actual knowledge, but that Mr. Martin's involvement with the sale of the stolen vehicles was sufficient to warrant an inference of willful blindness because he did not investigate the bona fides of the operation. Opinion at App. 12.

If actual knowledge may be proven by evidence of willful blindness, and if willful blindness may be inferred from a failure to inquire, then the actual knowledge component of criminal charges may be satisfied by evidence that the accused should have known his or her conduct was unlawful. This is a negligence standard which has no place in a criminal case. Moreover, by the First Circuit's logic, a conscious avoidance instruction will always be warranted in any case where guilty knowledge is a contested issue.

The opinion below has the practical effect of depreciating the reasonable doubt standard to the level of proof appropriate for liability in tort, while at the same time expanding the application of the conscious avoidance instruction to situations where it is both unnecessary and unwarranted.

CONCLUSION

The decision of the United States Court of Appeals for the First Circuit is incorrect as a matter of fact and law, conflicts with decisions from other Circuit Courts, and presents significant questions of federal law not previously decided by this Court. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 85-1985
No. 86-1152

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM MARTIN,

Defendant, Appellant.

No. 86-1072
No. 86-1073

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES REKRUT,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, *U.S. District Judge*]

Before

Campbell, *Chief Judge,*

Wisdom,* *Senior Circuit Judge,*

and Coffin, *Circuit Judge.*

John A. MacFadyen for William Martin.

Neil P. Philbin with whom *Kirshenbaum & Kirshenbaum* was on brief for James Rekrut.

Maury E. Epner with whom *Lincoln C. Almond,* United States Attorney, *Robert D. Krause,* Assistant United States Attorney, and *Patty Merkamp Stemler,* Department of Justice, were on brief for appellee.

April 6, 1987

Campbell, *Chief Judge.* Appellants Martin and Rekrut, together with four others, Cortellesso, Speakman, Carnevale and Galligan, were indicted by a federal grand jury on counts charging interstate transportation of stolen motor vehicles, the sale and concealment of stolen motor vehicles, the interstate transportation of falsely made securities (*i.e.,* certificates of title), and conspiracy, in violation of 18 U.S.C. §§ 2312, 2313, 2314 and 371 (1982). When brought before the district court, Carnevale was acquitted. Cortellesso, Speakman and Galligan pled guilty to several counts with the balance of the charges being dismissed. Cortellesso and Speakman entered into a plea agreement, agreeing to cooperate with the government;

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* Of the Fifth Circuit, sitting by designation.

they both testified against Martin and Rekrut at trial. Martin was convicted on 41 counts that included violations of each of the previously cited sections. Rekrut was convicted on one count of interstate transportation of a falsely made security under 18 U.S.C. § 2314. Martin and Rekrut now appeal. We affirm Martin's conviction, but reverse Rekrut's.

The facts, viewed in a light most favorable to the government, include the following. In 1978 Cortellesso decided to sell repaired used cars. Needing a license to do so, he paid Lionel Belanger of Pershing Auto Sales $200 per month to use two of Pershing's dealer plates.[1] Several months later Cortellesso originated the scheme through which Martin purchased a wrecked car from an insurance company, procured a duplicate title for the car, eliminated from the chain of title all reference to the insurance company as a past owner, and forged the signature of the last owner of the car in the assignment block. Galligan stole a car that matched the wreck, as closely as possible in color, model, year, engine size and number of doors, and delivered it to Cortellesso. Cortellesso and Speakman then removed all the vehicle identification numbers from the wrecked car and transferred them to the stolen car. In addition, the locks of the stolen car were exchanged, the odometer was reset, and the stolen car was cleaned and prepared for sale.

Martin was then in charge of transporting the retagged cars to the Northway Auction in Albany, New

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1. In early 1981 Lionel Belanger changed the name of his business from Pershing to Belanger Auto Sales, and Cortellesso then continued selling the cars under the Belanger name.

York, and selling the cars there to dealers. For this job he used various people including Carnevale and Rekrut. The latter two drove at least some of the cars to the auction, helped sell the cars there, and filled in the Pershing/Belanger name on title papers which they turned over to dealer-purchasers.

We will turn first to the issues raised by Martin.

I. MARTIN

A. *Admission of the Plea Agreements*

Martin claims it was error for the court to allow the government to read to the jury the full contents of Cortellesso's and Speakman's plea agreements. These included a provision that the witness will be exposed to prosecution for perjury if he gives false information or false testimony. Martin argues that for the prosecutor to present such provisions to the jury, unredacted, amounts to improper vouching for the credibility of the witness. Martin contends that "[t]his language suggested, inaccurately, that the Government was carefully monitoring the veracity of this witness." He adds that the contingent nature of the benefits accorded Cortellesso and Speakman provided an inducement for these witnesses to testify falsely.

We do not agree that informing the jury of the contents of a plea agreement of, at least, normal stripe is error. Martin relies upon *United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), a case markedly different from this (the prosecutor told the jury that a police officer had been monitoring the witness's testimony). The Ninth Circuit commented on the side,

> A trial court should be alert to the problem of vouching before admitting a plea agreement containing a promise to testify truthfully. The court should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions.

Id. at 536. In the present case, a cautionary instruction was given.

Recent circuit opinions have held that the admission into evidence of plea agreements "does not constitute impermissible bolstering of the witness's credibility." *United States v. Townsend,* 796 F.2d 158, 163 (6th Cir. 1986). *See, e.g., United States v. Binker,* 795 F.2d 1218, 1223 (5th Cir. 1986), *cert. denied,* 55 U.S.L.W. 3569 (Feb. 2, 1987); *United States v. Dennis,* 786 F.2d 1029, 1046-47 (11th Cir. 1986). Such agreements may often, as in the present case, point in different directions: a warning therein that the defendant will be prosecuted for false testimony enhances his credibility as a witness, but the rewards promised to him in the same document may undermine his credibility by showing that he stood to gain from incriminating others. *Townsend,* 796 F.2d at 163. As the district court noted, redaction would leave the jury with a slanted and false picture of what the bargain entailed. Only by viewing the entire agreement can the jury get the whole picture, from which to assess, as best it can, the probable motives or interests the witnesses could have in testifying truthfully or falsely.

Martin argues that, in any event, remarks made by the prosecutor in the redirect examination of Cortellesso and during rebuttal argument, constituted improper vouch-

ing for the witness's credibility. But we do not believe the prosecutor here portrayed himself "as a guarantor of truthfulness." *Roberts,* 618 F.2d at 537. The Eleventh Circuit has said that improper vouching may occur in two ways:

> First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity, Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.

United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), *cert. denied,* 465 U.S. 1034 (1984) (citations omitted).

Neither sort of impropriety took place here. At the end of his redirect examination of Cortellesso, the prosecutor said,

> Q. The plea agreement requires you to testify truthfully, is that correct?
>
> A. Yes, sir.
>
> Q. Have you told the truth to this jury as best you recall and recollect, sir?
>
> MR. BUTTERFIELD: Objection.
>
> THE COURT: Sustained.
>
> MR. KRAUSE: Thank you, Mr. Cortellesso, no further questions.

Then, in his rebuttal at closing argument the prosecutor said,

> The plea agreement that Mr. Butterfield says was such a deal. Each one of those individuals, Speakman, Cortellesso expect to go to jail. The plea agreements

> are in evidence, you can look at them. The Government is gong to recommend substantial jail, the maximum penalty is five years, and even with good time off, five years, four years in a Federal Penitentiary, that's no walk in the park. If the agreement was that they would be immunized from all prosecution, if they were to get straight probation and go about their business for the next several years, sure, you could say this stinks, something's rotten here. That's not the deal. The deal is that they are fully expected to go to jail. No immunity, no probation on that first count of conspiracy. In the final analysis of course it's up to the judge as to what happens but they all both expect to go to jail, and the Government is going to recommend that they go to jail.
>
> There's another clause in that plea agreement that says if they lie, they're in bigger trouble than they were when they walked into this courtroom because that's called perjury. And you decide whether they would risk that on top of everything else they had to risk. And the fact that the second count carries with it something other than jail, doesn't mean it's a light count because the judge can do pretty much what he wants with that count except jail. Probation, restitution for the next five years after Speakman and Cortellesso finish the first sentence. If they so much as drive with a suspended license, they're looking at another five years in the Federal Penitentiary. This is no walk in the park, this is no sweet deal. These people are going to jail and they came here and they told you the truth.

While we disapprove of the last quoted phrase ("they told you the truth"), the rest of these remarks, taken in context, were not improper. To say the plea agreement, already in evidence, required Cortellesso to tell the truth was not a personal assurance by the prosecutor that Cortellesso had indeed told the truth. The point was made,

moreover, only "after the defense had cross-examined the witness[es Cortellesso and Speakman] about the agreement in a manner that utilized the agreement to challenge the witness' credibility." *Binker,* 795 F.2d at 1223.

By the same token, the prosecutor's comments during rebuttal came only after, and in response to, the defense's discussion of the plea agreements in its own closing argument. The defense had argued that the agreements manifested the witnesses' motivation to fabricate. The Fifth Circuit has said in a similar situation,

> Typically, the fact that a government witness has made a plea bargain with respect to the events at issue is a matter which the defense desires to heavily emphasize as adversely affecting the witness' credibility, giving him an ulterior motive to falsely implicate the defendant. If the terms of the plea bargain are proper, . . . then certainly it is appropriate for the government to respond by asserting that the agreement provides an incentive to tell the truth rather than to lie. Nor is it reasonable that the government be made to appear as if it were hiding the plea agreement or its terms by being prevented from mentioning them until they are first brought out by the defense, at least assuming that the defense does not waive the right to bring those matters out. Normally, if the agreement is gone into, all proper terms relevant to the witness' motive may be disclosed.

Binker, 795 F.2d at 1225.

We hold that the government's comments regarding the plea agreement did not constitute an improper vouching for the witnesses' credibility. The prosecutor did not "place the prestige of the government behind the witness" nor indicate that "information not presented to the jury supports the testimony." *Sims,* 719 F.2d at 377.

We have already indicated that we think the prosecutor's concluding flourish during rebuttal ("they told you the truth") was improper. Literally this was vouching, although it can also be taken in context simply as rhetoric. However construed, it was the sort of borderline lapse which, at most, amounted to harmless error.

B. *The Willful Blindness Instruction*

Martin argues that the court erred in giving the jury an instruction on willful blindness because the government produced no evidence that he deliberately avoided knowledge of the illegal scheme.

In *United States v. Picciandra,* 788 F.2d 39, 46 (1st Cir.), *cert. denied,* 107 S. Ct. 166 (1986), we said that a willful blindness instruction is appropriate when (1) defendant claims a lack of knowledge, (2) the facts suggest a conscious course of deliberate ignorance, and (3) the instruction, taken as a whole, cannot be misunderstood by a juror as mandating such an inference.

The first part of this inquiry is plainly met in this case. Martin has all along claimed that Cortellesso and Speakman erred in testifying that Martin was aware of the fraudulent scheme.

As to the second part of the *Picciandra* test, whether the facts suggested a conscious course of deliberate ignorance depended upon whether the jury believed Cortellosso's and Speakman's testimony that Martin was aware of the criminal scheme. If the jury believed them, deliberate ignorance was irrelevant, since Martin was then not ignorant but full knowledgeable. In such event, an instruction on willful blindness was redundant but surely not harmful.

The jury may, however, have disbelieved Cortellesso and Speakman. Martin contended that the two men were lying, insisting that their deal with the government motivated them to implicate him. If the jury accepted this argument, the remaining evidence was sufficient to show that Martin knew the cars were probably stolen and yet consciously followed a course of calculated ignorance. There was evidence that Martin had vast experience in the business of buying and selling cars, that he was buying salvage vehicles for Cortellesso and was selling them at an auction in upstate New York, that he was receiving duplicate titles through the mail and using them to sell the cars, that Martin and his men were selling the cars under the Pershing/Belanger name without authorization, that he had continuous contact with Cortellesso, and that he failed to show an auctioneer from Northway who came to Rhode Island the "reconditioning shop" where Martin said he picked up most of the cars. Given this and other evidence, and assuming the jury disbelieved Cortellesso and Speakman, they might still conclude that, although aware of the probability of wrongdoing, Martin had deliberately blinded himself by refusing to take the most elementary investigatory steps. *United States v. Rothrock,* 806 F.2d 318, 323 (1st Cir. 1986). We think this was a sufficiently plausible construction of the evidence for the court to have given a willful blindness instruction.

The last part of the *Picciandra* test is whether the court's instruction, taken as a whole, cannot be misunderstood by a juror as mandating an inference of willful blindness. This element causes no difficulty here. The court made it clear that it was up to the jury to find whether there was "willful disregard or deliberate closing of the

eyes'' and to draw the inference it deemed fit. The court did not suggest that the jury was in any way obliged to make adverse findings or inferences. The court further cautioned the jury ''that a showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge or deliberate disregard.''

Martin argues that even if the district court were correct in giving a willful blindness instruction, it should have included in it a caveat that in the event the jury found Martin deliberately avoided knowledge, he should not be convicted if he subjectively disbelieved that he was contributing to criminal activity. We need not address whether this particular caveat should have been added upon request, since Martin did not request any such instruction at the trial, nor did he object to the court's failure to give it. *See United States v. Krowen,* 809 F.2d 144, 150 (1st Cir. 1987). Without this unrequested addition, the instruction given by the court did not constitute plain error.

C. Denial of Motion for New Trial Based on Newly Discovered Evidence

Martin contends thae court erred in denying his motion for a new trial based on alleged new evidence. The evidence upon which Martin based his motion was a confession by codefendant Galligan and two other affidavits.

We have said that a motion for new trial on the basis of newly discovered evidence will ordinarily not be granted unless the moving party can demonstrate that

> (1) the evidence was unknown or unavailable to the defendant at the time of the trial; (2) failure to learn of the evidence was not due to lack of diligence by the

> defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant.

United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980).

The district court found that none of these elements had been shown. As to Galligan's confession, the evidence defendant suggests was most compelling in his favor, the court said that "there is nothing in the . . . confession which creates a reasonable doubt of Martin's guilt that would not otherwise have existed"; [t]o the contrary, the confession is wholly inculpatory as to Mr. Martin's guilt." The court explained extensively why it believed none of the "new" evidence warranted a new trial. We have examined this evidence and do not perceive any abuse of discretion in the ruling of the district court. "Ordinarily we will affirm the trial court's denial of a new trial unless the court has manifestly abused its discretion; the court's findings of fact will not be overturned unless they are without any support in the record." *Wright*, 625 F.2d at 1019.

Martin also contends the district court erred both in failing to give an adequate accomplice instruction and in its definition of "reasonable doubt." Martin did not object on these grounds to the court's instructions as given. Thus only if these matters constituted plain error would we consider them reversible error on appeal. The court's instructions as given were sufficient to obviate any issue of plain error.

II. REKRUT

Rekrut argues that the district court erred when it refused to allow his motion for a judgment of acquittal.

He says the evidence was insufficient, as a matter of law, to permit a rational jury to find him guilty beyond a reasonable doubt.

The sole count under which he was convicted, Count 57, read as follows:

> On or about August 20, 1981, in the District of Rhode Island and elsewhere, and in furtherance of the conspiracy charged in Count 1 of this indictment, defendants ARMAND CORTELLESSO, a/k/a "SMOKEY" CORTELLESSO; NICHOLAS A. SPEAKMAN; WILLIAM H. MARTIN, JR.; JAMES REKRUT; GENEROSO CARNEVALE, JR.; and JAMES GALLIGAN, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce, from the State of Rhode Island to the State of New York, falsely made, forged and altered securities; namely, Massachusetts duplicates Certificate of Title No. P707941 and a Rhode Island Dealer's Reassignment of Title relating to said Massachusetts duplicate Certificate of Title No. P707941, knowing the same to have been falsely made, forged and altered.
>
> In violation of Title 18, United States Code, Sections 2314 and 2.

For the jury to have convicted Rekrut as an aider and abettor under 18 U.S.C. § 2, it had to be shown that he

> in some way "associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed." Participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result.

United States v. Hathaway, 534 F.2d 386, 399 (1st Cir. 1976) (citations omitted). Thus it was not necessary to prove that Rekrut personally transported the falsely made, forged and altered certificate of title from Rhode Island to New York. It would be enough to show that he knowingly associated himself with a criminal scheme to do so.

The evidence amply established that the certificate of title specified in Count 57 had been altered and forged, that it had been transported in interstate commerce, that Rekrut filed in the Belanger name on the certificate as assignee of the vehicle and was present at the time the stolen car was sold at the Northway Auction in Albany, New York. What is in doubt is whether the evidence sufficiently shows that Rekrut was aware of the fraudulent nature of the certificate. Rekrut insists that merely selling cars for Martin at the Northway Auction—a legitimate enterprise—does not show he knew the cars were stolen and their papers, which he handled, forged. According to Rekrut, the government failed to present facts from which the jury could determine beyond a reasonable doubt that he was aware of the criminal nature of the sale in which he participated.

In arguing that there was sufficient evidence to establish knowledge, the government relies on the following:

(1) Rekrut had extensive experience in the automobile business;

(2) Despite his working for Martin, d/b/a Miracle Auto Sales, Rekrut inserted the name of Belanger, a dealership for which he did not work, as assignee on title certificates he gave out at the Northway Auction covering vehicles sold for Martin;

(3) There was evidence from which it could be inferred that the certificates of title relating to the approximately 100 vehicles Rekrut sold for Martin were all duplicates, rather than original certificates, a fact, it is said, that would have aroused Rekrut's suspicion;

(4) The events with which Count 57 are concerned came at the end of Rekrut's two- to three-year association with Martin;

(5)Rekrut's fingerprints and handwriting were identified on the certificate of title in question;

(6) All the cars Rekrut was involved in selling for Martin at the Northway Auction, Albany, New York, came from Rhode Island, a four-hour journey to the site of the auction. No other Rhode Island cars were sold at Northway;

(7) Rekrut was present when the car to which the title in Count 57 refers was sold at Northway;

(8) Rekrut made an exculpatory statement which the jury could have found to have been false, when he told an insurance representative that he, Rekrut had never transported vehicles to the auction.

Basing its determination on the above evidence, the district court found sufficient proof that Rekrut knew he was aiding and abetting a criminal scheme. The court having given a willful blindness instruction, we shall consider whether the evidence showed either that Rekrut knew of the falsity of the title document or else knew its falsity was so probable that his failure to inquire further amounted to willfully blinding himself. *United States v. Rothrock*, 806 F.2d at 323.

We find this a close and difficult question. The very fact that Rekrut, working for Martin for a period of some two or three years, helped sell about 100 stolen cars at auction would certainly, on its face, suggest a strong possibility that he knew what was going on. Nonetheless, this fact alone would not suffice to prove beyond a reasonable doubt that he was in on the scheme. It is possible that a crooked dealer would not tell his salesmen the cars were stolen. Rekrut's activities were apparently limited to selling cars for Martin at the Northway Auction in Albany, New York (plus driving cars there with a partner, to some unspecified degree). The vehicles came through with ostensibly legitimate title certificates. Rekrut would fill in the name of a dealer, Belanger, as assignee; there was some evidence that the last minute insertion of an assignee's name by the salesman is not a uncommon practice. No evidence was presented that Rekrut was involved in the stealing of cars or the forging of the papers.

The government contends that there were certain factors which would have told an experienced used car salesman, such as Rekrut, that the vehicles he was helping sell were likely stolen and hence their title certificates were forged. Thus the government stresses that the title certificates being provided by Martin were all duplicates—a fact, according to the government, that would have alerted an experienced salesman to the illegal source of the cars. Also suspicious, says the government, was the fact that Martin was marketing his cars in Albany, New York, a four-hour drive from Rhode Island where Martin received them. And the government also argues it was odd that Martin told Rekrut to insert Belanger's name as assignee rather than his own.

The trouble with these factors is that persons not experienced in marketing used cars cannot tell what to make of them. A lay person cannot say with assurance, for example, that it is unusual to market used cars with duplicate certificates of title. While there was expert testimony at trial that duplicate certificates are often used to facilitate schemes of this nature, by eliminating the name of an insurance company from the chain of title, there was no testimony that duplicates are not also commonly used for legitimate ends. For all we know, duplicate certificates may often be used. Hense it is not clear what an experienced salesman like Rekrut would have made from the fact that Martin's vehicles came through with duplicates. Similarly, there could be legitimate reasons, such as higher prices, for marketing used cars at a dealers' auction such as Northway that is four hours distant from the place where the cars had been located. While there was evidence that Martin's cars were the only ones from Rhode Island, there was no evidence as to how many other cars were there from similarly distant places. And we have no knowledge as to whether, in a legitimate used car business, salesmen like Rekrut might properly insert names of third party dealers like Belanger on title certificates. Conceivably an honest intermediary, standing in Martin's shoes, might act as the agent for someone like Belanger.

In brief, we think the government was asking the jury to draw inferences beyond their unaided competence. It may well be that to an experienced eye each of the above factors *would* have been dead giveaways that the cars were likely stolen. But a jury is unable to draw such in-

ferences from its ordinary experience. Evidence was required.

The final piece of allegedly telling evidence was that Rekrut had denied to an insurance salesman that he transported cars for Martin. The evidence that this was untruthful rests on rather hazy testimony by Cortellesso indicating that Rekrut played some indeterminate role in assisting an associate, Carnevale, deliver cars. We do not think whatever slight inference of guilty knowledge the jury could draw from Rekrut's later denial of transporting cars is sufficiently strong, by itself, to rescue the government's case.

We conclude that while the evidence undoubtedly warrants strong suspicion that Rekrut was knowingly implicated, it fails to meet the standard required for proof of guilt beyond a reasonable doubt. We accordingly reverse Rekrut's conviction.

Martin's conviction is affirmed; the conviction of Rekrut is reversed.